Public Prosecutor v Sathiaseelan a/l Periyasamy & Anor

HIGH COURT (SHAH ALAM) — CRIMINAL APPEAL NO 41–240 OF 2007
SU GEOK YIAM J
28 AUGUST 2009

Criminal Law — Penal Code — ss 392 & 397 — Robbery when armed with deadly weapon — Hurt caused to victim — Assessment of sentence — Whether previous drug related convictions relevant

Criminal Procedure — Appeal — Appeal against sentence — Whether sentence manifestly inadequate — Whether magistrate failed to consider relevant factors when assessing sentence

Criminal Procedure — Sentence — Aggravating circumstances — Accused intoxicated when committing robbery with deadly weapon — Intoxication not caused without consent of accused by malicious or negligent act of another person — Accused not temporarily or otherwise insane by reason of intoxication when committing robbery — Whether intoxication ought to be considered aggravating circumstance when assessing sentence

Criminal Procedure — Sentence — Plea of guilty — Principles of — Circumstances when guilty plea ought not to be accepted as mitigating factor — General rule that credit ought to be given where accused pleads guilty, exceptions to

Criminal Procedure — Sentence — Previous convictions — Consideration of — Consideration of previous drug related convictions

The complainant and his friend were confronted by the first and second respondents and a third unknown person armed with sticks. The first respondent took from the complainant and his friend two handphones and cash amounting to RM524. The first respondent thereafter hit the complainant's friend with the stick causing him to suffer injuries. However, before they could escape, the first and second respondents were arrested by the police. The respondents were charged in the magistrates' court with robbery under s 392 read with s 397 of the Penal Code ('Code'). They pleaded guilty, were convicted and each sentenced to nine months'

imprisonment and one stroke of the cane. The first respondent had two drug-related antecedents. The magistrate did not take these into account on the basis that they were for different types of offences. The DPP appealed against both the sentences contending that the sentences were manifestly inadequate. At the hearing of the appeal, the first respondent had finished serving the sentence imposed at first instance. He opposed the appeal in person, contending that he was drunk at the material time, had repented and was remorseful. The appeal did not proceed against the second respondent as the notice of appeal could not be served against him.

Held, allowing the DPP's appeal:

(1) The sentence was manifestly inadequate. The magistrate had seriously erred. She had only paid lip service to the public interest element. Her sentence did not reflect this very important factor, although she had expressly mentioned this element in her grounds of judgment (see para 28).

(2) The magistrate erred when she failed to appreciate that an offender's guilty plea ought not to be accepted as a mitigating factor where the offence committed is a grave one. In the instant case, the offence committed by the first respondent was indeed grave as he was armed with a deadly weapon, ie a stick (see para 29).

(3) The magistrate had also erred by failing to appreciate the rampancy of robbery in the country. Parliament had prescribed mandatory imprisonment for offences under s 392 of the Code and had further enhanced the term of imprisonment to 14 years where the offence was committed between sunset and sunrise. In the instant case, the offence was committed shortly after midnight (see paras 30–31).

(4) The magistrate had further erred when she failed to consider that: (i) the first respondent was caught red-handed with the loot; and (ii) the complainant's friend had been injured by the first respondent. The first respondent clearly could not avail himself of any credible defence. The fact that the first respondent was drunk at the material time ought to have been considered an aggravating factor. There was nothing to indicate that his state of intoxication had been caused without his consent by the malicious or negligent act of another person or that he was insane temporarily or otherwise by reason of his intoxication, when committing the offence (see para 32).

(5) The magistrate also erred when she ruled that the first respondent's two previous drug related convictions could not be taken into account because they were for different offences. Although the first respondent had been previously sentenced to 16 months' imprisonment for drug possession, that sentence had not deterred him from committing

another and more serious crime. Clearly, the first respondent had not learnt his lesson. Instead he had progressed to committing a more serious crime that rendered him a danger to others (see para 33).

(6) The sentence of nine months' imprisonment was manifestly inadequate. The sentence would not serve the public interest by inducing the respondent not to commit such offences in the future. It would also not deter other would-be offenders from committing similar offences. An appropriate sentence would be seven years' imprisonment and three strokes of the cane. The sentence ought to be commensurate with the culpability of the first respondent in causing trauma, injury and monetary loss to the complainant and his friend, even though the cash and handphones were subsequently recovered by the police (see paras 35–36). *Radin Ibrahim bin Gusti Yassar v Public Prosecutor* [1988] 3 MLJ 237 followed.

(7) There are recognised exceptions to the general rule that credit should be given where a person pleads guilty. The magistrate erred when she failed to consider the relevant exceptions applicable in the instant case. Further, drug related offences have serious repercussions which include the commission of offences such as thefts, snatch thefts, burglaries and robberies (see paras 40 & 42). *Bachik bin Abdul Rahman v Public Prosecutor* [2004] 2 MLJ 534 followed.

[Bahasa Malaysia summary

Pengadu dan temannya didatangi responden pertama dan kedua dan orang ketiga yang tidak dapat dikenalpasti dan mereka bersenjatakan kayu. Responden pertama menyamun dua telefon bimbit dan wang tunai berjumlah RM524 daripada pengadu dan temannya. Responden pertama kemudiannya memukul teman pengadu dengan kayu dan mengakibatkannya mengalami kecederaan. Walau bagaimanapun, sebelum mereka melepaskan diri, responden pertama dan kedua ditahan polis. Responden-responden dituduh di mahkamah majistret atas kesalahan merompak di bawah s 392 dibaca bersama s 397 Kanun Keseksaan ('Kanun'). Mereka mengaku bersalah, disabitkan dan masing-masing dihukum dengan penjara Sembilan bulan dan satu kali sebatan. Responden pertama terlibat dengan kesalahan berkaitan dadah sebelum itu. Majistret tidak mengambil perkara tersebut dalam pertimbangan atas alasan bahawa kesalahan-kesalahan tersebut adalah berbeza. TPR merayu terhadap kedua-dua hukuman dan berhujah bahawa hukuman-hukuman tersebut tidak berpatutan. Semasa pendengaran rayuan, responden pertama telah selesai menjalani hukuman yang dikenakan pada kali pertama. Dia menentang rayuan tersebut dan berhujah bahawa dia mabuk pada masa tersebut, telah bertaubat dan menyesal. Rayuan tidak

diteruskan terhadap responden kedua kerana notis rayuan tidak dapat diserahkan kepadanya.

Diputuskan, membenarkan rayuan:

(1) Hukuman tersebut amat tidak berpatutan. Majistret secara seriusnya telah khilaf. Beliau hanya bercakap kosong terhadap unsur kepentingan awam. Hukumannya tidak mencerminkan faktor penting itu, walaupun beliau dengan jelas menyatakan unsur ini dalam alasan penghakimannya (lihat perenggan 28).

(2) Majistret telah khilaf apabila gagal menilai bahawa pengakuan salah pesalah tidak harus diambilkira sebagai faktor mitigasi kerana kesalahan tersebut adalah kesalahan berat. Dalam kes ini, kesalahan yang dilakukan oleh responden pertama adalah berat kerana dia bersenjatakan senjata berbahaya, iaitu sebatang kayu (lihat perenggan 29).

(3) Majistret juga telah khilaf apabila gagal mengambilkira kekerapan kegiatan rompakan di negara ini. Parlimen telah memperuntukkan hukuman penjara mandatori bagi kesalahan di bawah s 392 Kanun dan telah menambah jangkamasa pemenjaraan tersebut kepada 14 tahun apabila kesalahan tersebut dilakukan antara waktu senja dan waktu matahari terbit. Dalam kes ini, kesalahan tersebut dilakukan sejurus selepas tengah malam (lihat perenggan 30–31).

(4) Majistret juga khilaf apabila beliau gagal mempertimbangkan bahawa: (i) responden pertama ditangkap bersama dengan barang rompakan; dan (ii) teman pengadu dicederakan oleh responden pertama. Nyata sekali responden pertama tidak mempunyai pembelaan yang kukuh. Fakta bahawa responden pertama mabuk pada masa tersebut seharusnya dilihat sebagai faktor yang lebih memburukkan. Tidaka ada apa-apa yang menunjukkan bahawa dia dipaksa sehingga menjadi mabuk oleh orang lain yang bertindak dengan niat jahat atau cuai atau dia gila sejenak atau gila disebabkan kemabukannya, apabila melakukan kesalahan tersebut (lihat perenggan 32).

(5) Majistret juga khilaf apabila beliau memutuskan bahawa dua sabitan responden pertama sebelum ini tidak boleh dimabilkira disebabkan sabitan tersebut berkaitan kesalahan berbeza. Walaupun responden pertama sebelum ini dihukum 16 bulan penjara atas kesalahan memiliki dadah, hukuman tersebut tidak mencegahnya melakukan jenayah lain yang lebih serius. Nyata sekali responden pertama tidak insaf. Dia malah melakukan jenayah yang lebih serius yang menjadikannya merbahaya kepada orang lain (lihat perenggan 33).

(6) Hukuman penjara sembilan bulan sangat tidak berpatutan. Hukuman tersebut tidak memuaskan kepentingan awam untuk mencuba membuatkan responden tidak lagi melakukan kesalahan yang masa di masa hadapan. Hukuman tersebut juga tidak mencegah orang lain melakukan kesalahan tersebut. Hukuman yang berpatutan adalah hukuman penjara tujuh tahun dan tiga kali sebatan. Hukuman haruslah berpadanan dengan kebersalahan responden pertama yang mengakibatkan trauma, kecederaan dan kehilangan wang pengadu dan temannya, walaupun wang dan telefon bimbit tersebut ditemui semula oleh pihak polis (lihat perenggan 35–36); *Radin Ibrahim bin Gusti Yassar v Public Prosecutor* [1988] 3 MLJ 237 diikut.

(7) Terdapat pengecualian yang diiktiraf kepada peraturan am bahawa pengurangan harus diberikan kepada orang yang mengaku bersalah. Majistret telah khilaf apabila beliau gagal mempertimbangkan pengecualian-pengecualian yang relevan terpakai kepada kes ini. Selanjutnya, kesalahan berkaitan dadah mempunyai kesan serius yang mana termasuklah berlakunya kesalahan-kesalahan mencuri, meragut, pecah rumah dan rompakan (lihat perenggan 40 & 42); *Bachik bin Abdul Rahman v Public Prosecutor* [2004] 2 MLJ 534 diikut.

[**Editorial note**: The Penal Code (Amendment) Act 2006 (Act A1273), amended, inter alia, s 392 of the Penal Code with effect from 7 September 2007. Section 11 of the Amendment Act (Act A1273) deleted the words in s 392 of the Penal Code that read 'ten years and shall also be liable to fine; and if the robbery is committed between sunset and sunrise the imprisonment may be extended to'. The sentence prescribed after the amendment is imprisonment for a term which may extend to fourteen years and liability to a fine or whipping.]

Notes

For cases on aggravating circumstances, see 5(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 3325–3327.

For cases on appeal against sentence, see 5(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 179–183.

For cases on plea of guilty, see 5(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 3858–3907.

For cases on previous convictions, see 5(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 3934–3943.

For cases on ss 392 & 397 of the Penal Code, see 4 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 1784–1796.

Cases referred to

Abdul Rahman bin Ibrahim v Public Prosecutor of Johore [1938] MLJ 219 (refd)

Bachik bin Abdul Rahman v PP [2004] 2 MLJ 534, CA (folld)

Deputy Public Prosecutor v Isaac Elion [1949] MLJ 160 (refd)
Leong Ka Kong v PP [1976] 2 MLJ 21, HC (refd)
Liow Chow & Anor v PP [1939] MLJ 170 (refd)
PP v Jafa bin Daud [1981] 1 MLJ 315, HC (refd)
PP v Lim Swee Guan [1969] 1 MLJ 84, HC (refd)
R v Ball (1951) 35 Cr App R 164, CA (refd)
Radin Ibrahim bin Gusti Yassar v PP [1988] 3 MLJ 237, HC (folld)
Tia Ah Leng v PP [2004] 4 MLJ 249, CA (refd)

Legislation referred to
Dangerous Drugs Act 1952 s 12(2)
Penal Code ss 392, 397

Mohd Mustaffa P Kunyalam (Deputy Public Prosecutor, Attorney General's Chambers) for the appellant.
Respondent in person.

Su Geok Yiam J:

[1] This is an appeal by the appellant against the sentence of nine months imprisonment from the date of arrest and one (1) whipping which was imposed by the Klang Magistrates' Court on both the respondents on 26 September 2007.

[2] On 12 August 2007 the respondents were charged in the Klang Magistrates' Court as follows:

> Bahawa kamu, bersama-sama dengan seorang lagi yang masih bebas, pada 12/8/07 jam lebih kurang 12.25 pagi, di rumah alamat no: 548 Jalan Jambu, Pandamaran, di dalam daerah Klang, di dalam Negeri Selangor, dengan niat bersama, seperti yang ditakrifkan di bawah seksyen 34 Kanun Keseksaan, telah merompak, Noorhafizul Bin Abllah (KPT: 850708-13-5463) iaitu 2 telefon bimbit jenis Nokia dan wang tunai RM524.00 dan semasa melakukan rompakan itu, kamu bersenjatakan dengan kayu dan dengan itu, kamu telah melakukan suatu kesalahan yang boleh dihukum dibawah Seksyen 392 dan 397 Kanun Keseksaan.

FACTS OF THE CASE

[3] The facts of the case are, briefly, as follows.

[4] On 12 August 2007 at 12.25am while the complainant and his friend, Mohd Firdaus bin Jamlus ('Firdaus') were in a room in a house rented by their employer for his employees at the address stated in the charge, they were confronted by the two (2) respondents and another unknown Indian man

who had gone to their house to enquire about the whereabouts of a Bangladeshi man named Ali. All of the three men were armed with sticks. The two respondents entered the complainant's room. When the complainant replied that he did not know, the second respondent left the room whilst the first respondent locked the room door and searched the room. He then took two handphones and RM517 belonging to the complainant and RM7 belonging to Firdaus. In addition to that, he hit Firdaus on his left shoulder with the stick causing Firdaus to suffer injury to his left ear and shoulder. He then left the room but before he and the second respondent could escape Firdaus rushed to the front of the house and closed the grill door.

[5] Coincidentally at that point in time the complainant's employer, one Lim Chong Huat, who was approaching the house in a car with three of his friends saw the third unknown Indian man who was armed with a stick speeding off on his motorcycle from the compound of the house.

[6] On reaching the front door of the house Lim Chong Huat saw Firdaus who told him that he and the complainant had been robbed by the two respondents who were still in the house. Upon seeing the two respondents Lim Chong Huat contacted the police who happened to be doing their crime prevention rounds around that area. The police rushed to the house and succeeded in arresting both the respondents who were still in the house.

[7] Upon searching the first respondent the police found on him the two handphones and also the cash of RM524.

[8] On the same day both the respondents were charged in the Klang Magistrates' Court.

THE LEARNED MAGISTRATES'S DECISION

[9] On 26 September 2007 both the respondents pleaded guilty to the charge. After considering the facts which were tendered by the prosecuting officer and admitted to by both the respondents and their plea in mitigation, the learned magistrate convicted and sentenced the first and second respondents who were aged twenty seven (27) and thirty (30) years, respectively, to nine (9) months imprisonment from the date of arrest and one (1) whipping.

[10] Being dissatisfied with the sentence imposed by the learned magistrate the public prosecutor filed a notice of appeal to the High Court.

GROUNDS FOR APPEAL

[11] In para 3 of the petition of appeal the public prosecutor has relied on five grounds of appeal. They are as follows:

(i) Majistret telah terkhilaf dari segi fakta dan undang-undang apabila gagal mengambil kira keseriusan kesalahan di bawah Seksyen 392 Kanun Keseksaan yang memperuntukkan hukuman penjara yang boleh sampai sepuluh (10) tahun dan juga boleh dikenakan denda dan jika kesalahan tersebut dilakukan di antara matahari terbenam sehingga matahari terbit, hukuman yang boleh dikenakan adalah penjara yang boleh sampai empat belas (14) tahun dan juga boleh dikenakan denda atau sebatan. Hukuman yang dijatuhkan adalah terlampau tidak mencukupi (manifestly inadequate) terhadap responden-responden.

(ii) Majistret telah terkhilaf dari segi fakta dan undang-undang apabila gagal mengambil kira bahawa kesalahan seperti ini kerap berlaku pada masa ini (rampancy of offence).

(iii) Majistret telah terkhilaf dari segi fakta dan undang-undang apabila gagal mengambil kira kesalahan-kesalahan lampau responden-responden.

(iv) Majistret telah terkhilaf dari segi fakta dan undang-undang apabila terlalu menitik beratkan pengakuan salah oleh Responden-responden sedangkan kesalahan responden-responden adalah serius.

(v) Majistret telah terkhilaf dari segi fakta dan undang-undang apabila terlalu melebihkan kepentingan Responden daripada kepentingan awam.

THE APPELLANT'S SUBMISSION

[12] At the hearing of this appeal on 30 July 2009, Encik Mohamad Mustaffa, learned deputy public prosecutor ('DPP') submitted that the sentence was manifestly inadequate. He relied on the cases of *Tia Ah Leng v Public Prosecutor* [2004] 4 MLJ 249 and *Public Prosecutor v Jafa bin Daud* [1981] 1 MLJ 315 and urged the court to allow the appeal and substitute the sentence with a deterrent one.

[13] Learned DPP argued that the respondents' plea of guilt should not be accepted as a mitigating factor when he had no defence to the charge. As authority for this principle of law he cited the case of *Bachik bin Abdul Rahman v Public Prosecutor* [2004] 2 MLJ 534.

THE RESPONDENT'S SUBMISSION

[14] The first respondent opposed the appeal. Although he was unrepresented, he urged the court, through the court interpreter, not to enhance his sentence on the grounds that he was drunk at the time he committed the offence and that he has repented and is remorseful for what had happened.

[15] As for the second respondent the court was unable to proceed with the public prosecutor's appeal against him because the notice for the hearing of the appeal could not be served on him. The court has fixed a new date for the mention of the appeal against him.

DECISION OF THIS COURT

[16] Having heard both the learned DPP and the first respondent, the court allowed the public prosecutor's appeal on 30 July 2009. The court enhanced the first respondent's sentence of nine months imprisonment and one (1) whipping by substituting it with a sentence of seven (7) years imprisonment from the first respondent's date of arrest and three (3) whippings. As the first respondent had already served his sentence the court ordered the first respondent to serve the balance of the seven years imprisonment and the three (3) whippings.

[17] The first respondent being dissatisfied with the said order has filed a notice of appeal to the Court of Appeal.

Whether this court ought to disturb the lower court's decision on sentence?

[18] The law on this issue is trite. It is that a court when exercising its appellate jurisdiction must consider whether the sentence which has been passed by a court subordinate to it is wrong either in law or that it is manifestly excessive or inadequate on the facts and circumstances before interfering with that sentence.

[19] This principle of law was applied by Gordon-Smith J in the case of *Deputy Public Prosecutor v Isaac Elion* [1949] MLJ 160.

[20] The learned judge said as follows on p 161, in the left hand column:

> ... before an appellate court interfered with the sentence of a court below, the appellate court had to be satisfied that the sentence must be shown to be wrong either in law or that it is manifestly excessive or inadequate on the facts and circumstances ... I would ... refer to *Liow Chow & Anor v Public Prosecutor* and *Abdul Rahman v Public Prosecutor*), the latter case being approved by the former.

[21] In the case of *Abdul Rahman bin Ibrahim v Public Prosecutor of Johore* [1938] MLJ 219, McElwaine CJ who delivered the judgment of the Criminal Court of Appeal said as follows in the fourth paragraph in the left hand column on p 220:

> This court will, in determining appeals, ... reduce or enhance sentences when, having before us all the material which the trial judge had before him, we consider, having regard to all the circumstances of the case, that the sentence imposed is manifestly excessive or inadequate.

[22] The learned judge also said as follows in the first paragraph on the right hand column on the same page:

> Sentence is, subject to the limits imposed by law, a matter of discretion. The Court of Appeal will not lightly interfere with the exercise of discretion but when the statute under which an appeal is brought provides that the appellate court shall, if it thinks that a different sentence should have been passed, quash the sentence and pass some other sentence the occasion may well arise when the power conferred should be exercised.

[23] This principle of law found favour with the Criminal Court of Appeal in the case of *Liow Chow & Anor v Public Prosecutor* [1939] 8 MLJ 170. In that case the court held as follows in the second and third paragraphs in the left hand column on p 171:

> In *Abdul Rahman v Public Prosecutor of Johore* 7 MLJ 219 the Court of Appeal of Johore indicated that an appellate court would reduce or enhance sentences when, having before it all the material which the trial judge had before him, it considers, having regard to all the circumstances of the case, that the sentence imposed was manifestly excessive or inadequate.
>
> The sentence of the court of first instance should not be altered unless the appellate court considers the sentence unjust. An appellate court must reject 'the lore of nicely calculated less or more' in matters of sentence. Before the sentence is altered it must be manifestly wrong, wrong either in the sense of being illegal or of being unsuitable to the proved facts and circumstances.

[24] In the case of *Public Prosecutor v Lim Swee Guan* [1969] 1 MLJ 84, Ong Hock Sim J in dismissing an appeal against sentence cited the case of *R v Ball* (1951) 35 Cr App R 164 which restated the principles which must guide a court in deciding what is the right sentence to pass on a prisoner and the principles which govern appeals against sentence, said as follow:

> The principles which govern appeals against sentence are too familiar but could bear repeating and I therefore quote the words of Hilbery J in the case of *R v Ball*.

It appears to us appropriate that we should restate the principles which must guide a court in deciding what is the right sentence to pass on a prisoner. In the first place, this court does not alter a sentence which is the subject of an appeal merely because the members of the court might have passed a different sentence. The trial judge has seen the prisoner and heard his history and any witnesses to character he may have chosen to call. It is only when a sentence appears to err in principle that this court will alter it. If a sentence is excessive or inadequate to such an extent as to satisfy this court that when it was passed there was a failure to apply the right principles, then this court will intervene.

In deciding the appropriate sentence a court should always be guided by certain considerations. The first and foremost is the public interest. The criminal law is publicly enforced, not only with the object of punishing crime, but also in the hope of preventing it. A proper sentence, passed in public, serves the public interest in two ways. It may deter others who might be tempted to try crime as seeming to offer easy money on the supposition, that if the offender is caught and brought to justice, the punishment will be negligible. Such a sentence may also deter the particular criminal from committing a crime again, or induce him to turn from a criminal to an honest life. The public interest is indeed served, and best served if the offender is induced to turn from criminal ways to honest living. Our law does not, therefore, fix the sentence for a particular crime, but fixes a maximum sentence and leaves it to the court to decide what is, within that maximum, the appropriate sentence for each criminal in the particular circumstances of each case. Not only in regard to each crime, but in regard to each criminal, the court has the right and the duty to decide whether to be lenient or severe.

Section 310 of the Criminal Procedure Code (Cap 21) reads:

At the hearing of the appeal the court may, if it considers there is no sufficient ground for interfering, dismiss the appeal or may —

(c) in an appeal as to sentence, reduce or enhance the sentence, or alter the nature of the sentence.

The grounds of appeal were based on the failure of the learned president to have regard to the public interest and the seriousness of the offence and it is contended also that the sentences of one year to run concurrently is inappropriate. In the words of s 302 of the Criminal Procedure Code (Cap 21) as amended by s 2 of Ordinance 40 of 1950 the last ground should allege 'on the ground of the inadequacy of the sentence.

[25] The deputy public prosecutor in the case of *Abdul Rahman v Public Prosecutor of Johore*, was Abdul Hamid. When Abdul Hamid was elevated as a High Court judge he also applied the same principle in the case of *Leong Ka Kong v Public Prosecutor* [1976] 2 MLJ 21. He held that sentences should not be interfered with by the appellate court merely because the individual presiding in the higher court might, having personal views, on the matter, have passed a different sentence.

[26] The learned judge said as follows on p 22-I in the left hand column:

> Insofar as this court is concerned, in exercise of its appellate jurisdiction, it shall consider whether the sentences of the court below were wrong in law or were they manifestly excessive on the facts and circumstances justifying interference. It is settled law that sentences should not be interfered with by the appellate court merely because the individual presiding in the higher court might, having personal views on the matter, have passed a different sentence.
>
> Our system, as practiced today, has vested the magistrates and presidents with wide discretionary power in the matter of the amount of punishment. Such discretionary power must not, however, be exercised in complete disregard of the facts and circumstances of the case. In point of fact, the discretion must be exercised judicially. Now, in consideration of what I have said, the court should not therefore interfere with the lower court's discretion unless there is apparent on the face of the record a manifest error either in law, or, in considering the facts and circumstances of the case. The nature of the offences committed in particular that which is violent in nature and one that involves the security of life and property, must necessarily be viewed gravely.

[27] Applying the above principles of law which govern appeals against sentence to the instant appeal the court was satisfied that the appeal had merits and that the sentence of the learned magistrate had to be enhanced on the following grounds.

[28] Firstly, the court agreed with and accepted the learned DPP's submission that the sentence was manifestly inadequate. The learned magistrate made a serious error when she only paid lip service to the most important factor in sentencing which is the public interest because her sentence did not reflect this very important factor although she had expressly mentioned in her grounds of judgment, on pp 18–19 of the appeal record as follows:

> Dalam menjatuhkan hukuman terhadap OKT-OKT, mahkamah juga telah mengambil kira kepentingan awam ...
>
> Di dalam kes yang dihadapkan di mahkamah ini, pihak pendakwaan berhujah bahawa di atas kepentingan awam, OKT-OKT patut dikenakan hukuman berat kerana ia boleh dihukum 14 tahun penjara. Namun begitu, mahkamah berpendapat bahawa hukuman penjara sembilan bulan dan satu kali sebatan adalah memadai memandang OKT-OKT baru berumur 27 tahun dan 30 tahun yang boleh dianggap muda dan masih mempunyai peluang untuk memperbaiki diri pada masa akan datang.

[29] Secondly the learned magistrate also erred when she accepted the first respondent's plea of guilt as a mitigating factor. By doing so, she had failed to appreciate another important principle of sentencing that where an offence

which is committed by the offender is grave a plea of guilt ought not to be accepted as a mitigating factor. The nature of the offence which was committed by the first respondent was rendered grave by virtue of the undisputed fact that he was armed with a deadly weapon, ie a stick. Section 397 of the Penal Code also provides that the offender shall be liable to whipping if the offender was armed with a deadly weapon at the time of committing the offence of robbery.

[30] Thirdly, she also erred when she did not appreciate the rampancy of such offences in our country. It is indeed sad but true that it is common knowledge that robberies in residential and commercial buildings are rampant in this country. The court has to take judicial notice of the increasing number of robberies involving break-ins into occupied buildings and premises as news of such happenings are constantly being reported in the newspapers and also on television.

[31] This is the current state of affairs although Parliament has already provided in s 392 of the Penal Code that a sentence of imprisonment is mandatory for an offence under that section and that the term of imprisonment which may be imposed by the court may extend to 14 years if the crime is committed between sunset and sunrise. The offender is also liable to be fined and whipped. In the instant appeal the offence was committed shortly after midnight.

[32] Fourthly, the learned magistrate also erred when she did not consider that the first respondent was caught red handed by the police in the rented house with the loot still on his body whilst the complainant's friend, Firdaus, had suffered injury to his left shoulder and ear at the hand of the first respondent. Thus, the first respondent clearly could not avail himself of any credible defence. The fact that he was drunk at the time of the commission of the offence ought to have been considered as an aggravating factor because there were no facts to show that his state of intoxication was caused without his consent by the malicious or negligent act of another person or that by reason of his intoxication he was insane, temporarily or otherwise, at the time he hit Firdaus with the stick and took the two handphones and the cash belonging to the complainant and Firdaus.

[33] Fifthly, the learned magistrate also erred when she ruled that the first respondent's two previous drug related convictions could not be taken into account because they were for a different type of offence. The reason is because it is common knowledge that some drug addicts do commit crimes such as robbery in order to feed their drug habit. The sentence of 16 months imprisonment which was imposed on the first respondent by the magistrate's court on 23 January 2007 for possession of dangerous drug under s 12(2) of

the Dangerous Drugs Act 1952 shows that the sentence of imprisonment has not deterred him from committing another and more serious crime. What is clear is that he has not only not learnt his lesson but has instead progressed to committing a more serious type of crime which has caused him to be a danger to others.

[34] It is because of this sorry state of affairs that some developers have built what is commonly known as gated and guarded developments which come with a premium because these developments have a concrete 5' perimeter wall surrounding each of the development and a guard house at the single entry and exit point with security guards on duty 24 hours a day and closed circuit televisions (CCTVs) to monitor the state of the security of the residents within the development. However, such developments are, unfortunately, beyond the reach of the majority of the residents and citizens in our country. In considering an appropriate sentence to be imposed on the first respondent the learned magistrate ought to have given serious consideration to this security problem in our country.

[35] The court was of the considered view that based on the facts and circumstances of the instant appeal the sentence of nine months imprisonment and one whipping was manifestly inadequate. The sentence would not serve the public interest by inducing the respondent not to commit such offences in the future and also to deter other would-be offenders from committing similar offences on the mistaken impression that if they are caught they will be let off with a lenient sentence. An appropriate sentence would be seven (7) years and three (3) whippings. The first respondent ought to be made to suffer the pain of having his liberty deprived for a long period of time and being whipped three times in order to realise that committing armed robbery upon the occupiers of residential premises between the hours of sunset and sunrise will invite a deterrent and retributive sentence in order to protect the innocent members of the public who currently live in fear although they are in the safety of their own homes.

[36] The sentence ought to be commensurate with the culpability of the first respondent in causing trauma, injury and monetary loss to the complainant and his friend, Firdaus. This is so even though the monetary loss suffered by Firdaus was only temporary as the cash and the two handphones were subsequently recovered by the police from the first respondent because of the efficiency of the police in responding promptly to the telephone call of the complainant's employer. The first respondent ought not to be dealt with leniently because of this. The reason is because in most cases the culprits manage to escape and the victims are left traumatised for a long time after the incident.

[37] I find support for the views which I have expressed above in the decided cases cited below.

[38] In the case of *Radin Ibrahim bin Gusti Yassar v Public Prosecutor* [1988] 3 MLJ 237, Chong Siew Fai J, in dismissing an appeal against sentence for the offence of housebreaking by night said as follows on pp 237I–238A:

> Housebreaking by night of other persons' dwelling houses in order to the commission of theft is considered a serious matter not only because of the intrinsic value of whatever is stolen but because of the intrusion into the houses which causes insecurity and fear to householders even in their own homes. The gravity of the offence is reflected by the provision of the imprisonment term which may extend to 14 years in the Penal Code. The offence deserves fairly severe punishment and offenders must expect custodial sentences.

[39] In the case of *Bachik bin Abdul Rahman v Public Prosecutor* [2004] 2 MLJ 534, Augustine Paul JCA in delivering the judgment of the Court of Appeal dismissing the appellant's appeal against sentence said as follows in para 17 on p 542 on the issue whether credit should be given in every case where a person pleads guilty:

> The learned judge appears to have taken the view that credit should be given in every case where a person pleads guilty. The position in law is that it is generally accepted that an accused person should be given credit or discount for pleading guilty (see *Sau Soo Kim v Public Prosecutor* [1975] 2 MLJ 134; *Public Prosecutor v Sulaiman bin Ahmad* [1993] 1 MLJ 74; *Public Prosecutor v Ravindran & Ors* [1993] 1 MLJ 45). The discount that is given is normally a reduction of the sentence by about a third of what would otherwise have been imposed (see *Mohamed Abdullah Ang Swee Kang v Public Prosecutor* [1988] 1 MLJ 167; *Public Prosecutor v Muhari bin Mohd Jani & Anor* [1996] 3 MLJ 116; *Christopher Khoo Ewe Cheng v Public Prosecutor* [1998] 3 MLJ 881). However, this is not a strict rule as the court may in tie exercise of its discretion, refuse to grant any discount in an appropriate case (see *Zaidon bin Shariff v Public Prosecutor* [1996] MLJU 159; [1996] 4 CLJ 441; *Public Prosecutor v Leo Say & Ors* [1985] 2 CLJ 155). Its application in favour of an accused depends on the facts and circumstances of each case (see *Wong Kai Chuen Philip v Public Prosecutor* [1991] 1 MLJ 321). Thus, as lucidly explained by Charles JA in *Leigh Nicholas Donnelly v R* (1997) 91 A Crim R 550 at p 554:
>
> > A court's attitude towards the fact of a plea of guilty is expected to act as an encouragement to enter such a plea. The issue with which the court is to be concerned is what weight should be given to it in the circumstances.
>
> and in para 18 on p 543:
>
> > The circumstances in which a guilty plea will not have any weight are varied. The severity of the offence committed may outweigh the mitigating effect of a guilty plea (see *Loh Hock Seng & Anor v Public Prosecutor* [1980] 2 MLJ 13; *Public*

A *Prosecutor v Oo Leng Swee & Ors* [1981] 1 MLJ 247). Where public interest demands a deterrent sentence in the circumstances of a particular case, then the effect of a guilty plea must also give way (see *Sim Gek Yong v Public Prosecutor* [1995] 1 SLR 537; *Public Prosecutor v Govindnan a/l Chinden Nair* [1998] 2 MLJ 181). A guilty plea cannot also be a powerful mitigating factor when effectively no defence to the charge is available to the accused (see *Public Prosecutor v Low Kok Wai* [1988] 3 MLJ 123).

[40] From the above excerpts it is clear that there are certain recognised exceptions to the general rule that credit should be given where a person C pleads guilty. The learned magistrate erred when she failed to consider the relevant exceptions which are applicable to the instant appeal as stated above.

[41] In *Tia Ah Leng v Public Prosecutor*, Mokhtar Sidin JCA in delivering the judgment of the Court of Appeal which dismissed the appellant's appeal D against sentence recognised that addiction to drugs has led to other offences such as thefts, burglary and snatch thefts. The learned judge said as follows in para 254F-H:

> The addiction to drugs have led to other offences such as thefts, burglary and E snatch thefts. Some of these offences lead to serious consequences. We have read in the newspapers that some drug addicts have gone to the extent of hurting their own families such as their mothers, sisters, and grandmothers in order to get some money to purchase the drugs to support their addictions. Recently, a woman died when a snatcher snatched her handbag and she was dragged together with the handbag some distance away and as a result of that she died. F

[42] The above excerpt shows the serious repercussions of drug related offences which include the commission of the offences such as thefts, snatch thefts, burglary, and I shall add, robberies. In the premises, the court set aside G the sentence passed by the learned magistrate on 26 September 2007 and sentenced the first respondent to seven (7) years imprisonment and three (3) whippings to reflect the gravity of the offence and the abhorrence of the public to the type of offence which was committed by the first respondent.

H *DPP's appeal allowed.*

Reported by Andrew Christopher Simon

I